88-171

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PETER W. HERZOG and JOAN L. HERZOG,
Appellants,

vs.

SAM J. COLDING, as Collier County Property Appraiser,
and the DEPARTMENT OF REVENUE
OF THE STATE OF FLORIDA,
Appellees.

On Appeal from the Second District Court of Appeal,
Lakeland Florida

JURISDICTIONAL STATEMENT

PETER W. HERZOG, JR.
Counsel of Record
555 Washington Avenue
Sixth Floor
St. Louis, Missouri 63101
(314) 231-6700

KATHRYN A. KLEIN
CARUTHERS, HERZOG, CREBS
& MCGHEE
555 Washington Avenue
Sixth Floor
St. Louis, Missouri 63101
(314) 231-6700

Counsel for Appellants

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

QUESTIONS PRESENTED

I. WHETHER ARTICLE VII, SECTION 6 OF THE FLORIDA CONSTITUTION AND SECTION 196.031 OF THE FLORIDA STATUTES, WHICH GRANT A TAX EXEMPTION TO RESIDENT OWNERS OF REAL PROPERTY BUT DENY SAME TO NON-RESIDENT OWNERS OF REAL PROPERTY IN THE STATE OF FLORIDA, VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV, SECTION 2 OF THE CONSTITUTION OF THE UNITED STATES?

II. WHETHER ARTICLE VII, SECTION 6 OF THE FLORIDA CONSTITUTION AND SECTION 196.031 OF THE FLORIDA STATUTES, WHICH GRANT A TAX EXEMPTION TO RESIDENT OWNERS OF REAL PROPERTY BUT DENY SAME TO NON-RESIDENT OWNERS OF REAL PROPERTY IN THE STATE OF FLORIDA, VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PETER W. HERZOG and JOAN L. HERZOG,
Appellants,

vs.

SAM J. COLDING, as Collier County Property Appraiser,
and the DEPARTMENT OF REVENUE
OF THE STATE OF FLORIDA,
Appellees.

On Appeal from the Second District Court of Appeal,
Lakeland Florida

JURISDICTIONAL STATEMENT

Peter W. Herzog and Joan L. Herzog respectfully pray that this Court review the Order of the Florida District Court of Appeal, Second District, denying Appellants' Motion for Rehearing En Banc, or in the Alternative, for Certification to the Supreme Court of Florida as a Question of Great Public Importance entered on April 27, 1988 and the order of the Second District Court of Appeal affirming per curiam the Summary Final Judgment of the Circuit Court of Collier County dated March 9, 1988. This jurisdictional statement is submitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial federal question is presented by the Order of the Summary Final Judgment of the Circuit Court which holds that Article VII, section 6 of the Florida Constitution and section 196.031 of the Florida Statutes, as applied in this case, are not unconstitutional as

violative of the Privileges and Immunities Clause, Article IV, section 2, and the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. The Appellants contend that the above sections of the State Constitution and Statute are unconstitutional as applied in this case.

OPINIONS BELOW

The opinion of the Florida District Court of Appeal, Second District is unreported, but is reprinted in the Appendix hereto. (App. A-4).

The Summary Final Judgment of the Circuit Court of the Twentieth Judicial Circuit in Collier County, Florida is unreported, but is reprinted in the Appendix hereto. (App. A-6).

JURISDICTION

The Florida District Court of Appeal, Second District, entered its order affirming per curiam the Summary Final Judgment of the Circuit Court for Collier County on March 9, 1988. Appellants filed a Motion for Rehearing En Banc, or in the Alternative, for Certification to the Supreme Court of Florida as a Question of Great Public Importance. This Motion was denied on April 27, 1988. Appellants filed a notice of appeal to the Supreme Court of Florida on May 20, 1988, but said appeal was dismissed for lack of proper jurisdiction on May 27, 1988.

On July 13, 1988, a notice of appeal to the Supreme Court of the United States was timely filed in the Florida District Court of Appeal, Second District, the court rendering the judgment from which this appeal is taken, and in the Circuit Court of the Twentieth Judicial Circuit in Collier County, Florida, the court that is in possession of the record.

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. IV, § 2:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fla. Const. art. VII, § 6:

> (a) Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon, except assessments for special benefits, up to the assessed valuation of five thousand dollars, upon establishment of right thereto in the manner prescribed by law. The real estate may be held by legal or equitable title, by the entireties, jointly, in common, as a condominium, or indirectly by stock ownership or membership representing the owner's or member's proprietary interest in a corporation owning a fee or a leasehold initially in excess of ninety-eight years.
>
> (b) Not more than one exemption shall be allowed any individual or family unit or with respect to any residential unit. No exemption shall exceed the value of the real estate assessable to the owner or, in case of ownership through stock or membership in a corporation, the value of the

proportion which his interest in the corporation bears to the assessed value of the property.

(c) By general law and subject to conditions specified therein, the exemption shall be increased to a total of twenty-five thousand dollars of the assessed value of the real estate for each school district levy. By general law and subject to conditions specified therein, the exemption for all other levies may be increased up to an amount not exceeding ten thousand dollars of the assessed value of the real estate if the owner has attained age sixty-five or is totally and permanently disabled and if the owner is not entitled to the exemption provided in subsection (d).

(d) By general law and subject to conditions specified therein, the exemption shall be increased to a total of the following amounts of assessed value of real estate for each levy other than those of school districts: fifteen thousand dollars with respect to 1980 assessments; twenty thousand dollars with respect to 1981 assessments; twenty-five thousand dollars with respect to assessments for 1982 and each year thereafter. However, such increase shall not apply with respect to any assessment roll until such roll is first determined to be in compliance with the provisions of section 4 by a state agency designated by general law. This subsection shall stand repealed on the effective date of any amendment to section 4 which provides for the assessment of homestead property at a specified percentage of its just value.

(e) By general law and subject to conditions specified therein, the Legislature may provide to renters, who are permanent residents, ad valorem tax relief on all ad valorem tax levies. Such ad valorem tax relief shall be in the form and amount established by general law.

Fla. Stat. § 196.031:

(1) Every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his permanent residence, or the permanent residence of another or others legally or naturally dependent upon such person, is entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of $5,000 on the residence and contiguous real property, as defined in s. 6, Art. VII of the State Constitution. Such title may be held by the entireties, jointly, or in common with others, and the exemption may be apportioned among such of the owners as shall reside thereon, as their respective interest shall appear; but no such exemption of more than $5,000 shall be allowed to any one person or on any one dwelling house, except that an exemption up to the assessed valuation of $5,000 may be allowed on each apartment occupied by a tenant-stockholder or member of a cooperative apartment corporation and on each condominium parcel occupied by its owner; nor shall the amount of the exemption allowed any person exceed the proportionate assessed valuation based on the interest owned by such person.

* * *

(3) (a) * * *

(d) For every person who is entitled to the exemption provided in subsection (1) and who is a permanent resident of this state, the exemption is increased to a total of $25,000 of assessed valuation for taxes levied by governing bodies of school districts.

(e) For every person who is entitled to the exemption provided in subsection (1) and who is a resident of this state, the exemption is increased to a total of $25,000 of assessed valuation for levies of taxing

authorities other than school districts. However, the increase provided in this paragraph shall not apply with respect to the assessment roll of a county unless and until the roll of that county has been approved by the executive director pursuant to s. 193.1142.

* * *

STATEMENT OF THE CASE

Appellants Peter W. Herzog and Joan L. Herzog own real property in Naples, Florida located at 3160 Fort Charles Drive in Collier County. Since acquiring said property in 1979, Appellants have frequently occupied their Florida home as a temporary residence, particularly when necessary to enable Peter W. Herzog to pursue the practice of law in the State of Florida, where he is licensed. Appellants, however, have maintained their permanent residence in the State of Missouri, where Mr. Herzog is also a member of the State Bar and where both Appellants are registered to vote and pay income taxes.

Sam J. Colding, as Collier County Property Appraiser (hereinafter "Colding"), and the Department of Revenue for the State of Florida (hereinafter "Department of Revenue") have assessed ad valorem taxes on Appellants' real property, and on the real property of other non-permanent residents of the State of Florida on a basis that differs from that utilized for permanent residents. Specifically, the State of Florida grants only to permanent residents of Florida a $25,000.00 exemption on the assessed value of their real property. This exemption is found in Article VII, section 6 of the Constitution of the State of Florida and is implemented by Florida Statute section 196.031.

Appellants did not file an application for the Florida tax exemption since they were clearly ineligible under the permanent residency requirements. On November 22, 1985, Appellants commenced this action by filing a Complaint for Declaratory

Judgment against Sam Colding and the Department of Revenue of the State of Floria in the Circuit Court of the Twentieth Judicial Circuit in Collier County, Florida. (R. 6-8)

HOW THE FEDERAL QUESTION WAS RAISED

Appellants' Complaint for Declaratory Judgment alleged in part that:

> Assessment of the non-resident Plaintiffs' property at 3160 Fort Charles Drive at a value determined without the applicability of the $25,000.00 Homestead Exemption discriminates against Plaintiffs and is illegal and void for the reason that said denial of said Homestead Exemption violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States of America and Article IV Section 2 of the Constitution of the United States of America . . . .

(R. 6-8). The federal question presented was not changed in the two ensuing amended complaints. (R. 14-16; R. 31-34). Both the Appellants and Appellee Department of Revenue filed Motions for Summary Judgment. (R. 41-45; 40). On March 20, 1987 the Circuit Court entered an order of Final Summary Judgment denying Appellants' motion and granting the motion filed by Appellee Department of Revenue. In doing so, the court found, in part, that:

> None of the federal cases or other legal authorities relied upon by the Plaintiffs hold that it is constitutionally impermissible for a state to impose a condition precedent that real property has to be used as a "permanent residence" in order to be entitled to Homestead Exemption relief from ad valorem taxation.

(App. A-7).

Appellants reiterated their constitutional claims when appealing to the Florida District Court of Appeal for the Second

District. Brief of Appellants. After oral argument, the District Court of Appeal per curiam affirmed the Judgment of the lower court.

THE QUESTIONS ARE SUBSTANTIAL

I.

Even though both the Florida constitutional and statutory provisions in issue phrase the grant of the tax exemption in the terminology of "residence" rather than "citizenship," the resulting discrimination still violates the Privileges and Immunities Clause of Article IV, section 2 of the United States Constitution. As this Court has often noted, citizenship and residency are essentially interchangeable. *See, e.g., Supreme Court of Virginia v. Friedman,* 56 U.S.L.W. 4669, 4670 (U.S. June 20, 1988), *aff'g,* 822 F.2d 423 (4th Cir. 1987); *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274, 279 n.6, 105 S.Ct. 1272, 1276 n.6, 84 L.Ed.2d 205 (1985); *United Bldg. & Const. Trades Council v. Mayor & Council of Camden,* 465 U.S. 208, 216, 104 S.Ct. 1020, 1026, 79 L.Ed.2d 249 (1984). Thus, the residency requirement of Florida's tax exemption must be examined under this Court's previously enunciated two-step inquiry. In *Supreme Court of Virginia v. Friedman,* this Court stated that:

> First, the activity in question must be " 'sufficiently basic to the livelihood of the Nation' ... as to fall within the purview of the Privileges and Immunities Clause ...." ... Second, if the challenged restriction deprives nonresidents of a protected privilege, we will invalidate it only if we conclude that the restriction is not closely related to the advancement of a substantial State interest.

Supreme Court of Virginia v. Friedman, 56 U.S.L.W. at 4670 (citations omitted).

The Privileges and Immunities Clause requires states to treat residents and non-residents equally when basic rights or essen-

tial activities are concerned. *Baldwin v. Montana Fish & Game Comm'n,* 435 U.S. 371, 387, 98 S.Ct. 1852, 1862, 56 L.Ed.2d 354 (1978). In *Paul v. Virginia,* 8 Wall. 168, 19 L.Ed. 357 (1869), Mr. Justice Field expounded on the essential purpose of this Clause in stating that:

> It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

Id. at 180. (*quoted in Baldwin v. Montana Fish & Game Comm'n,* 435 U.S. at 380-81, 98 S.Ct. at 1858-59).

Although this Court has never conclusively enumerated all of the rights and activities protected by the Privilege and Immunities Clause, the leading case of *Corfield v. Coryell,* 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (No. 3,230) has provided guidance in this area for many decades. In *Corfield,* Mr. Justice Washington listed various privileges and immunities which were clearly embraced by the general description of privileges deemed to be fundamental and specifically included:

> The right of a citizen of one state to pass through or to reside in any other state for the purposes of trade, agriculture, professional pursuits, or otherwise; . . . to take, hold, and dispose of property, either real or per-

> sonal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state . . . .

Id. at 552 (*quoted in Blake v. McClung,* 172 U.S. 239, 249, 19 S.Ct. 165, 169, 43 L.Ed. 432 (1898)).

Ths Court recently noted in *Piper* that the necessity of protecting these listed privileges to ensure the fusion of the several states into a Nation has not diminished. *Supreme Court of New Hampshire v. Piper,* 470 U.S. at 281 n.10, 105 S.Ct. at 1277 n.10. Unquestionably, the right to own property and the right to representation in taxation are two of the most fundamental rights on which this Nation was founded. As the Court has observed, non-residents have no opportunity to redress their grievances at the election polls, and so would be left with only uncertain remedies if not for the constitutional protection afforded by the Privileges and Immunities Clause. *United Bldg. & Const. Trades Council v. Mayor & Council of Camden,* 465 U.S. at 217-18, 104 S.Ct. at 1027; *Austin v. New Hampshire,* 420 U.S. 656, 662-63, 95 S.Ct. 1191, 1195-96, 43 L.Ed.2d 530 (1975); *Toomer v. Witsell,* 334 U.S. 385, 395, 68 S.Ct. 1156, 1162, 92 L.Ed. 1460 (1948).

After determining that a state is discriminating between residents and non-residents in regard to fundamental rights, the Court then must examine whether there is a substantial reason for the discrimination and whether the discrimination bears a close relation to the reason. *Supreme Court of Virginia v. Friedman,* 56 U.S.L.W. at 4670; *United Bldg. & Const. Trades Council v. Mayor & Council of Camden,* 465 U.S. at 222, 104 S.Ct. at 1029. In order to constitute a "substantial reason" for legitimate discrimination, this Court has found that the non-resident must constitute a peculiar source of the evil at which the state law is aimed. *United Bldg. & Const. Trades Council v. Mayor & Council of Camden,* 465 U.S. at 222, 104 S.Ct. at 1029; *Hicklin v. Orbeck,* 437 U.S. 518, 525, 98 S.Ct. 2482, 2487, 57 L.Ed.2d 397 (1978); *Toomer v. Witsell,* 334 U.S. at 398, 68 S.Ct. at 1163.

The Appellees in this case had the burden to establish that the State of Florida had a substantial reason for the discrimination practiced on non-residents by the residency requirement found in the grant of the tax exemption. The Appellees' failure to meet this burden is abundantly clear from the Appellees' failure even to agree in the lower courts on the legislature's rationale in including a permanent residency requirement in the tax exemption grant. In his Brief to the Second District Court of Appeal, Colding suggests that the residency requirement is aimed at the encouragement of non-residents to relocate. Appellee's Answer Brief at 3-4. Contrarily, the Department of Revenue alleges in its Appellate Brief that the purpose of the tax exemption is to relieve Florida citizens in part from their tax burdens so as to ensure their maintenance of a "basic homestead." Answer Brief of Appellee, Department of Revenue, State of Florida at 27-28.

The Department of Revenue emphasized that Article VII, section 6(a) of the Florida Constitution and subsection (1) of section 196.031 of the Florida Statutes refer to a "permanent residence." The Department argued that this reflected the intention of exempting a homestead rather than discriminating against non-residents. *Id.* However, subsections (3) (d) and (e) of section 196.031 specifically state that the $25,000.00 exemption inures to "a permanent resident of this state" or "a resident of this state," respectively.

Further, the Department contended that the exemption can be claimed on only one dwelling and thus, even permanent residents owning two or more dwellings within the State cannot obtain tax relief on a second, vacation home. *Id.* at 11-13. The "vacation home" argument is fallacious, however. Florida Statute section 196.015 mandates certain factors that the property appraiser must take into consideration when determining whether the dwelling is the "permanent residence" of the applicant. Those factors are:

(1) Formal declarations of the applicant.
(2) Informal statements of the applicant.

(3) The place of employment of the applicant.
(4) The previous permanent residency by the applicant in a state other than Florida or in another country and the date non-Florida residency was terminated.
(5) The place where the applicant is registered to vote.
(6) The place of issuance of a driver's license to the applicant.
(7) The place of issuance of a license tag on any motor vehicle owned by the applicant.
(8) The address as listed on federal income tax returns filed by the applicant.
(9) The previous filing of Florida intangible tax returns by the applicant.

Fla. Stat. § 196.015 (Supp. 1988). These factors do not require the appraiser to consider the length of time during which the dwelling is occupied; only questions of citizenship are posed. Consequently, Florida citizens may claim whatever home they may care to as their "permanent residence" simply by complying with the factors enumerated above. This may be their "vacation home" on the beach, while they reside more often in an apartment in the interior. One thing is clear from these requirements; Florida residents may have a tax break at the place of their choice and Appellants may not at any site in Florida because they are citizens of Missouri.

Notwithstanding the fact that neither reason advanced by the Appellees constitute a "substantial reason" for discriminating against non-residents, these purposes also fail to satisfy the applicable legal standard. Assuming that insufficient immigration into the State of Florida and Florida citizens' inability to maintain a homestead due to their tax burdens are actually "evils" sought to be remedied by the tax exemption, the Appellees still have failed to establish how non-residents' ownership of property caused these evils. Neither can the Appellees establish a correlation between the revenue derived from the differential in taxation of residents and non-residents and the amelioration of

the evil. *Toomer v. Witsell,* 334 U.S. at 398-99, 68 S.Ct. at 1163-64. No evidence has been offered to support such a contention.

When examining tax classifications based on residency, this Court has sought to ascertain whether a tax burden placed solely on non-residents is counterbalanced by a corresponding benefit to the non-residents or by a corresponding burden on residents. *Austin v. New Hampshire,* 420 U.S. 656, 95 S.Ct. 1191, 43 L.Ed.2d 530 (1975); *Travis v. Yale & Towne Mfg. Co.,* 252 U.S. 60, 40 S.Ct. 228, 64 L.Ed. 460 (1920); *Shaffer v. Carter,* 252 U.S. 37, 40 S.Ct. 221, 64 L.Ed. 445 (1920); *Travelers' Insurance Co. v. Connecticut,* 185 U.S. 364, 22 S.Ct. 673, 46 L.Ed. 949 (1902). As this Court recognized long ago:

> Absolute equality in taxation can never be attained. That system is the best which comes the nearest to it. . . . The object should be to place the burden so that it will bear as nearly as possible equally upon all.

Travelers' Insurance Co. v. Connecticut, 185 U.S. at 371-72, 22 S.Ct. at 676 (quoting *Tappan v. Merchants' National Bank,* 19 Wall. 490, 504, 22 L.Ed. 189, 195 (1874)).

In *Shaffer* and *Travelers',* the Court upheld the tax schemes, determining that the non-residents were only required to make their ratable contribution in shouldering the State tax burden. *Shaffer v. Carter,* 252 U.S. at 56, 40 S.Ct. at 227; *Travelers' Insurance Co. v. Connecticut,* 185 U.S. at 371, 22 S.Ct. at 676. However, in *Austin* and *Travis,* this Court struck down the taxing systems when the tax was imposed exclusively on non-residents and was not offset by any benefit or equivalent burden on residents. *Austin v. New Hampshire,* 420 U.S. at 665, 95 S.Ct. at 1197; *Travis v. Yale & Towne Mfg. Co.,* 252 U.S. at 81, 40 S.Ct. at 232.

In this regard, the Department of Revenue argued at length in the lower courts the similarity between the case of *Rubin v.*

Glaser, 416 A.2d 382 (N.J.), *appeal dismissed*, 449 U.S. 997, 101 S.Ct. 389, 66 L.Ed.2d 239 (1980) and the present case. At issue in *Rubin* was the constitutionality of a homestead tax rebate only granted to residents of New Jersey. The Supreme Court of New Jersey upheld the validity of the statute. However, in *Rubin* the Homestead Rebate Act's enactment and operation were contingent upon the passage of the New Jersey Gross Income Tax Act and some of the revenues derived from the gross income tax were applied to the rebates. *Id.* at 387. Thus, although non-residents of New Jersey were denied the benefits of the property tax rebate, they had not contributed to the funds out of which the rebates were to be derived. Therefore, the differential treatment of the residents and non-residents in *Rubin* was directly related to the burden born particularly by residents.

The instant case differs from *Rubin* and the Supreme Court cases discussed above, however, in that Florida does not grant to taxpaying non-residents, as Appellants, any corresponding tax exemption or burden residents with any additional taxes which are related to the challenged tax exemption. Rather, the tax exemption only results in an inequitable tax burden born by non-Florida-residents and thus, the constitutional and statutory provisions granting said exemption are violative of the Privileges and Immunities Clause.

II.

The Equal Protection Clause prohibits the states from denying to any person within their jurisdiction the equal protection of the laws. *Western & Southern Life Ins. Co. v. State Board of Equalization of California*, 451 U.S. 648, 656-57, 101 S.Ct. 2070, 2077, 68 L.Ed.2d 514 (1981). However, the states are allowed to make reasonable classifications for tax schemes. *Williams v. Vermont*, 472 U.S. 14, 22, 105 S.Ct. 2465, 2471, 86 L.Ed.2d 11 (1985); *Western & Southern Life Ins. Co. v. State Board of Equalization of California*, 451 U.S. at 657, 101 S.Ct.

at 2077. The state need only establish classifications that the legislature could have reasonably concluded would promote a legitimate state purpose. *Williams v. Vermont,* 472 U.S. at 22-23, 101 S.Ct. at 2471.

In 1985, two Supreme Court cases revitalized the Equal Protection Clause as a barrier to discrimination by the states. These cases are analogous to the case at bar and so, will be examined in light of the reasons proffered by Colding and the Department of Revenue for the residency requirement of Florida's tax exemption as discussed in the previous section.

In *Metropolitan Life Insurance Co. v. Ward,* 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985), an Equal Protection challenge was raised against an Alabama Statute that imposed a lower gross premiums tax rate on domestic insurance companies than on out-of-state companies doing business within Alabama. The State urged two reasons for the discriminatory tax, one of which was that the heavier tax burden on foreign companies would encourage formation of companies within Alabama. *Id.* at 876, 105 S.Ct. at 1680. The Court stated that "Alabama's aim to promote domestic industry is purely and completely discriminatory, designed only to favor domestic industry within the State, no matter what the cost to foreign corporations also seeking to do business there." *Id.* at 878, 105 S.Ct. at 1681. Further, the Court emphasized that: "[T]his Court always has held that the Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening 'the residents of other state members of our federation.' " *Id.* at 878, 105 S.Ct. at 1682 (quoting *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 533, 79 S.Ct. 437, 444, 3 L.Ed.2d 480 (1959). Consequently, this Court found that the State's purpose was not legitimate. *Id.* at 880, 105 S.Ct. at 1682.

Similarly, Colding argued in the lower courts that the purpose of denying the tax exemption to non-residents of Florida was to encourage Florida property owners to establish Florida as their

"permanent residence." However, the promotion of immigration by harming non-resident property owners is no more legitimate when applied to natural persons than this same purpose was when applied to insurance companies in *Metropolitan Life*. Moreover, in the instant case at least, it is not even rational to presume that a heavy tax burden on non-residents would entice these persons to make Florida their permanent residence rather than merely sacrificing their property holdings in that state.

This Court also struck down a discriminatory tax scheme in *Williams v. Vermont*. In that case, the validity of a Vermont use tax exemption was in issue that discriminated on the basis of residence at the time of the purchase of an automobile. The legitimate purpose offered by the State was the improvement and maintenance of the state and interstate highway systems. *Williams v. Vermont*, 472 U.S. at 18, 105 S.Ct. at 2469. The Court found that the taxing statute was violative of the Equal Protection Clause because "[t]he purposes of the statute would be identically served, and with an identical burden, by taxing [both those who purchased their cars while residing in Vermont and those who made the purchase prior to changing their residence]. The distinction between them bears no relation to the statutory purpose." *Id.* at 24, 105 S.Ct. at 2472.

The Department of Revenue of the State of Florida also has offered a rationale for the residency requirement of the tax exemption that would be equally well-served by allowing the exemption to both Florida residents and out-of-state residents. If the State's purpose in granting the exemption was to relieve Florida residents of some of their tax burdens to enable them to maintain a homestead, this purpose is not furthered by denying non-residents an exemption on their Florida property.

Moreover, Florida's alleged purpose of protecting residents' "homesteads" is merely a subterfuge for discriminatorily taxing non-residents of Florida. The Department argued in its Answer Brief that:

> When the homestead exemption provisions of Article X, s. 4 and Article VII, s. 6, Fla. Const., are construed in para materia to each other, the clear intent of these two provisons [sic] of the Florida Constitution to afford the basic "homestead" necessary for maintaining shelter for the family unit some economic protection from the full impact of property debt and tax liability is apparent.

Answer Brief of Appellee, Department of Revenue, State of Florida at 28. However, a recent opinion handed down by the Florida Supreme Court on two consolidated cases completely discredits the Department's argument. In *Public Health Trust v. Lopez*, Nos. 70,968 & 71,618 (Fla. June 9, 1988), the court construed Article X, section 4, which serves to exempt a decedent's homestead property from forced sale for the benefit of the decedent's creditors. The court found that the homestead protection was available to "any natural person." *Id.* slip op. at 9. Unlike Article VII, section 6 that grants the tax exemption, Article X, section 4 contains no permanent residency requirement. As a result, the homestead protection from creditors granted in Article X would be completely available to the Appellants, though they are denied the tax exemption granted in Article VII. Such incongruity is irreconcilable and irrational when the Department's argument is based on construing these articles in para materia to each other.

Consequently, the State's purpose could be identically served by granting the tax exemption to Appellants and other non-permanent residents of Florida and, therefore, the classification system contained in the constitutional and statutory provisions granting the tax exemption cannot withstand analysis under the Equal Protection Clause. Indeed, Florida's scheme is exposed for what it is; a *tax preference* favoring citizens of Florida for which no rational explanation can be given.

CONCLUSION

For all of the foregoing reasons this appeal presents substantial federal questions and this Court should note probable jurisdiction.

Respectfully submitted,

PETER W. HERZOG, JR.
Counsel of Record
555 Washington Avenue
Sixth Floor
St. Louis, Missouri 63101
(314) 231-6700

KATHRYN A. KLEIN
CARUTHERS, HERZOG,
CREBS & McGHEE
555 Washington Avenue
Sixth Floor
St. Louis, Missouri 63101
(314) 231-6700

Counsel for Appellants

APPENDIX

APPENDIX A

IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

(Trial Court Case No. 85-2774-CA-01)

Appeal Cause No. 87-1056

Peter W. Herzog and Joan L. Herzog,
Appellants,

vs.

Sam J. Colding, as Collier County Property Appraiser,
and Department of Revenue of the State of Florida,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Peter W. Herzog and Joan L. Herzog, Appellants herein, appeal to the Supreme Court of the United States, the final order of this Court rendered on March 9, 1988 affirming per curiam the judgment of the trial court and the denial of Appellants' Motion for Rehearing En Banc or in the Alternative, for Certification to the Supreme Court of Florida as a Question of Great Public Importance entered on April 27, 1988.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ PETER W. HERZOG, JR.
Counsel of Record
555 Washington Avenue
Sixth Floor
St. Louis, Missouri 63101
(314) 231-6700

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of this Notice of Appeal was mailed, first-class postage pre-paid, on this 13th day of July, 1988 to all parties required to be served, to wit:

James H. Siesky, Esq.
791 10th Street, South
Suite B
Naples, Florida 33940

J. Terrell Williams
Assistant Attorney General
Department of Legal Affairs
Tax Section
Capital Building
Tallahassee, Florida 32399

/s/ PETER W. HERZOG, JR.
Counsel of Record

APPENDIX B

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

April 27, 1988

Case No. 87-1056

Peter W. Herzog and Joan L. Herzog,
Appellants,

v.

Sam J. Colding, as Collier County Property Appraiser,
and Department of Revenue of the State of Florida,
Appellees.

Appellants having filed a motion for rehearing en banc or, in the alternative for certification to the Supreme Court as a question of great public importance in the above-styled case, upon consideration, it is

ORDERED that said motion is hereby denied.

A TRUE COPY
ATTEST:

/s/ William A. Haddod, Clerk
Second District Court of Appeal

cc: Peter W. Herzog
J. Terrell Williams
Leo J. Salvatori, Esq.
James Siesky, Esq.

APPENDIX C

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

Case No. 87-1056

Peter W. Herzog and Joan L. Herzog,
Appellants,

v.

Sam J. Colding, as Collier County Property Appraiser,
and Department of Revenue of the State of Florida,
Appellees.

Opinion filed March 9, 1988.

Appeal from the Circuit Court for Collier County;
William C. McIver, Judge.

Peter W. Herzog of Caruthers, Herzog,
Crebs & McGhee,
St. Louis, Missouri and
Leo J. Salvatori of Quarles & Brady,
Naples, for Appellants.

James H. Siesky of Siesky,
Lehman & Espey, Naples for Appellee
Sam J. Colding and Robert A. Butterworth,
Attorney General and J. Terrell Williams,
Assistant Attorney General,
Tallahassee, for Appellee,
Department of Revenue.

State of Florida
County of Polk

This copy is a true copy of original opinion on file in this office.

Witness, my hand and official seal this sixteenth day of May, 1988.

/s/ William A. Haddad, Clerk
Second District Court of Appeal

PER CURIAM.

Affirmed.

DANAHY, C.J., and THREADGILL and PARKER, JJ., Concur.

APPENDIX D

IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT, IN AND FOR
COLLIER COUNTY, FLORIDA

Case No. 85-2774-CA-01

Peter W. Herzog & Joan Herzog,
Plaintiffs,

vs.

Sam J. Colding, et al.,
Defendants.

SUMMARY FINAL JUDGMENT

THIS MATTER came on for hearing on the Motions for Summary Judgment filed by the Plaintiffs and by the Defendant, Department of Revenue, State of Florida. The Plaintiffs allege in their Second Amended Complaint that the portion of the Homestead Exemption provisions of Art. VII, s. 6(c) and (d), Fla. Const., and the statutory provisions of s. 196.031(3)(d) and (e), Fla. Stat., imposing a "permanent residence" requirement in order for property to be entitled to the partial homestead exemption under Florida law is violative of the Due Process and Privileges and Immunities Clauses of the U.S. Constitution and the "similar provisions" of the Florida Constitution. All the parties hereto have agreed that there are no material disputed facts related to this issue. After reviewing the record and the various memorandums of law filed herein on behalf of the respective parties, and being otherwise duly advised, the Court finds and concludes that:

1. The subject constitutional subsections attacked by the Plaintiffs (subsections (c) and (d) of s. 6, Art. VII, Fla. Stat.)) do not contain any reference to "permanent residents" or "permanent residence." This language viewed as constitutionally

objectionable by the Plaintiffs is found in the preceding subsection (a) of Art. VII, s. 6 and in the challenged statutory provisions of s. 196.031(3)(d) and (e).

2. It is undisputed that the Plaintiffs are permanent residents of the State of Missouri, and that the subject real property owned by the Plaintiffs in Collier County, Florida, is a temporary residence occupied by the Plaintiffs from time to time during the year.

3. Plaintiffs failed to cite to the Court any statutes or case law of Florida holding that similar property owned by a permanent resident of Florida and occupied only periodically during the year as a "seasonal" or "vacation" dwelling would be entitled to the homestead tax exemption under Florida law.

4. None of the federal cases or other legal authorities relied upon by the Plaintiffs hold that it is constitutionally impermissible for a state to impose a condition precedent that real property has to be used as a "permanent residence" in order to be entitled to Homestead Exemption relief from ad valorem taxation.

IT IS THEREFORE, ORDERED AND ADJUDGED THAT:

(A) The Motion for Summary Judgment filed the Plaintiffs, Peter W. Herzog and Joan L. Herzog is denied.

(B) The Motion for Summary Judgment filed by the Defendant, Department of Revenue, State of Florida, is hereby granted.

(C) There being no other issues remaining, summary final judgment is hereby rendered against the Plaintiffs and in favor of the Defendants in this case.

DONE AND ORDERED, in Chambers at the Collier County Courthouse, Naples, Florida, this 19th day of March, 1987.

/s/ William C. McIver
Circuit Judge

Copies furnished to:
James H. Siesky, Esq.
Leo J. Salvatori, Esq.
J. Terrell Williams, Esq.
Peter W. Herzog, Esq.

CASE NO. 88-171

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PETER W. HERZOG and JOAN L. HERZOG,
Appellants,

vs.

SAM J. COLDING, as Collier County
Property Appraiser, and the
DEPARTMENT OF REVENUE
OF THE STATE OF FLORIDA,
Appellees.

On Appeal From
The District Court Of Appeal Of
Florida, Second District

APPELLEES' MOTION TO DISMISS OR AFFIRM

ROBERT A. BUTTERWORTH
Attorney General

J. TERRELL WILLIAMS
Assistant Attorney General

DEPARTMENT OF
LEGAL AFFAIRS
The Capitol - Suite 1501
Tallahassee, FL 32399-1050
(904) 488-1573
Attorneys for Appellees

QUESTIONS PRESENTED

I.

WHETHER THIS APPEAL IS TIMELY WHERE THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA WAS THAT OF THE HIGHEST COURT IN FLORIDA FROM WHICH A DECISION COULD BE HAD, AND THE NOTICE OF APPEAL WAS FILED MORE THAN 90 DAYS AFTER THE OPINION WAS ENTERED?

II.

WHETHER THE DENIAL UNDER FLORIDA LAW OF HOMESTEAD EXEMPTION TAX RELIEF TO REAL PROPERTY USED ONLY AS A TEMPORARY RESIDENCE PRESENTS A SUBSTANTIAL FEDERAL QUESTION?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATUTES

COURT RULES

OTHER AUTHORITIES

CASE NO. 88-171

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PETER W. HERZOG and JOAN L. HERZOG,
Appellants,

vs.

SAM J. COLDING, as Collier County
Property Appraiser, and the
DEPARTMENT OF REVENUE
OF THE STATE OF FLORIDA,
Appellees.

ON APPEAL FROM
THE DISTRICT COURT OF APPEAL OF
FLORIDA, SECOND DISTRICT

APPELLEES' MOTION TO DISMISS OR AFFIRM

The Appellees, pursuant to Supreme Court Rule 16, respectfully move to dismiss this appeal or, in the alternative, to affirm the opinion of the District Court of Appeal of Florida, Second District, on the grounds that (1) the appeal is not within the jurisdiction of this Court because the Notice of Appeal was untimely; and/or (2) the appeal does not present a substantial federal question.

STATUTORY AND RULE PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set out in the Appellants' Jurisdictional Statement, the following statutory and rule provisions are relevant here:

28 U.S.C. §2101(c)
Rule 35(c), Fed.R.App.P.
Supreme Court Rule 11.3
Rule 9.020(g), Fla.R.App.P.
Rule 9.125(c), Fla.R.App.P.
Rule 9.330(a), Fla.R.App.P.
Rule 9.331(c), Fla.R.App.P.
Rule 12D-7.007(5), Fla.Adm.Code
51 Fla.Jur.2d, Taxation, s.20:133

Pertinent portions of these authorities are set forth verbatim in the Appendix (A 1-7).

STATEMENT OF THE CASE

The Appellees are unable to accept the Appellants' Statement of the Case because it is incomplete. The material facts presented here are undisputed and it is only the application of the law to these undisputed facts that is at issue in this

case. The Appellants are permanent residents of the State of Missouri and they also own a dwelling in Collier County, Florida, which they used as a temporary residence during portions of the year 1985 (Jur. Stat. 6, A-7). The Appellants' temporary residence in Collier County was not granted Homestead Exemption ad valorem tax relief for the year 1985 under the applicable Florida law.

The Appellants contested the 1985 tax assessment on the subject property by filing a complaint in the trial court against the Collier County Property Appraiser and the Department of Revenue, State of Florida alleging that the "permanent residence" requirement under Florida law for homestead exemption tax relief was unconstitutional as applied to nonresidents of Florida (Jur. Stat. 6-7). The constitutional claims raised by the Appellants were that the challenged provisions of the Florida homestead exemption tax law allegedly violated both the Privileges and Immunities and the Equal Protection Clauses of the United States and Florida Constitutions (Jur. Stat. A 7).

On March 19, 1987, the trial court entered a "Summary Final Judgment", based solely on the pleadings of record and argument of counsel, rejecting the constitutional claims raised by the Appellants and upholding the 1985 tax assessment by the Property Appraiser on the Appellants' temporary residence in Collier County, Florida (Jur. Stat. A 6-7). The Appellants then filed a timely appeal of the trial court's adverse judgment resulting in a per curiam opinion being entered by the Second District Court of Appeal of Florida on March 9, 1988, affirming the summary judgment of the trial court (Jur. Stat., A-4).

The Appellants did not file a subsequent Motion for Rehearing under Florida Rule of Appellate Procedure 9.330, but chose to file a "MOTION FOR REHEARING EN BANC OR, IN THE ALTERNATIVE, FOR CERTIFICATION TO THE SUPREME COURT AS A QUESTION OF GREAT PUBLIC IMPORTANCE" (A 8-12). This Motion for Rehearing En Banc, etc., was denied by order of the Second District Court of Appeal of Florida dated April 27, 1988 (A 13). The Appellants also sought direct review to the Supreme Court of

Florida by filing a Notice of Appeal on May 25, 1988. However, this attempted appeal was summarily dismissed for lack of jurisdiction by order of the Florida Supreme Court dated May 27, 1988 (A 14).

On July 13, 1988, **over 120 days after the per curiam opinion of the Second District Court of Appeal of Florida was entered,** the Appellants filed their Notice of Appeal to this Court seeking direct review of the state district court opinion under 28 U.S.C. §1257(2) (Jur. Stat. 2).

On July 25, 1988, the Appellants' Jurisdictional Statement was received in the offices of the Attorney General of the State of Florida, counsel for the Appellees.

ARGUMENT

I

This appeal should be dismissed for lack of jurisdiction because the Notice of Appeal was not filed within 90 days after the per curiam opinion of the Second

District Court of Appeal of Florida was entered on March 9, 1988, as required by 28 U.S.C. §2101(c).

In their jurisdictional statement, the Appellants attempt to invoke the jurisdiction of this Court under 28 U.S.C. §1257(2). The Notice of Appeal cites both the per curiam opinion of the Second District Court of Appeal of Florida entered on March 9, 1988, and the court's order of April 27, 1988, denying their subsequent "Motion for Rehearing En Banc or, in the Alternative, for Certification to the Supreme Court of Florida as a Question of Great Public Importance", as being appealed. However, there is absolutely no precedent under federal or Florida law for an order denying a motion for rehearing en banc or other post-judgment motion being treated as a "final" judgment or decree for appellate review purposes. See, In Re Marachowsky Stores Co., 188 F.2d 686, 689 (7th Cir. 1951); Rule 9.020(g), Fla.R.App.P., Young Adults, Etc. v. B&B Cash Grocery Stores, Inc., 157 So.2d 809 (case 1) (Fla. 1963); and Finley v. Finley, 103 So.2d 191 (case 1) (Fla. 1958).

The Appellants also suggest that this appeal was timely filed within the 90-day period prescribed by 28 U.S.C. §2101(c) based on the fact that their "Motion For Rehearing En Banc, etc.", was denied by order of the Second District Court of Appeal of Florida on April 27, 1988 (Jur. Stat. 2). However, this contention has been expressly rejected by the Florida Supreme Court and the district courts of appeal of Florida.

This identical claim was reviewed by the Florida Supreme Court in the leading case of State v. Kilpatrick, 420 So.2d 868 (Fla. 1982). In the Kilpatrick case, the sole issue before the court was whether a Motion For Rehearing En Banc before a district court of appeal, which was filed separately [under Rule 9.331(c), Fla.R.App.P.], and not in conjunction with a Motion for Rehearing under Rule 9.330(a), Fla.R.App.P., had the effect of tolling the time for filing a petition for review in the Florida Supreme Court.

The Supreme Court of Florida clearly answered this question in the negative in its Kilpatrick opinion by succinctly

holding that ". . . the time for petitioning this Court was not tolled because the separately filed motion for en banc review was a non-allowable motion under Rule 9.331 and was in fact a nullity." Id., at 420 So.2d 868. The holding of the Florida Supreme Court in the Kilpatrick opinion that a separately filed appellate Rule 9.331 motion for rehearing en banc is a nullity under Florida law was subsequently followed by the First District Court of Appeal of Florida in its decision in La Grande v. B&L Services, Inc., 436 So.2d 337 (Fla. 1st DCA 1983).

A similar result also occurs under the comparable provisions of Fed.R.App.P. 35(c) which read in pertinent part that the ". . . pendency of such a suggestion [for a rehearing en banc] . . . shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate." See, also, U.S. v. Buljubasic, 828 F.2d 426 (7th Cir. 1987); and Stern, Gressman & Shapiro, Supreme Court Practice, 313 (6th ed. 1986).

The Appellants' belated alternative motion for "Certification to the Supreme

Court of Florida as a Question of Great Public Importance" was also totally unauthorized and a nullity under Florida law. A suggestion made by a party to an appeal that a matter should be certified to the Florida Supreme Court as a matter of great public importance must, under Rule 9.125, Fla.R.App.P., be filed soon after the notice of appeal to the district court of appeal is filed. Rule 9.125(c), Fla.R.App.P., mandates that any such motion or suggestion for certification to the Florida Supreme Court ". . . shall be filed within ten days from the filing of the notice of appeal". (e.s.) (A. 8)

It is thus evident that the Appellants' failure to file their Florida Appellate Rule 9.331(c) "Motion For Rehearing En Banc", etc., in conjunction with a Motion For Rehearing under Florida Appellate Rule 9.330(a) was fatal to this appeal.[1]/ Consequently, the conclusion is inevitable

[1]/ In accord, is Supreme Court Rule 11.3 specifying a timely filed **petition for rehearing** as the only post-judgment or decree pleading that will toll the time for filing a notice of appeal to this Court.

that Appellants' "Motion for Rehearing En Banc", etc., was a nullity and did not toll the time for filing a notice of appeal to this Court from the per curiam opinion of the Second District Court of Appeal of Florida entered on March 9, 1988.[2] Since the notice of appeal to this Court was filed on July 13, 1988, 126 days after entry of the challenged opinion of the state district court of appeal, this Court clearly lacks jurisdiction and the appeal should be dismissed.

[2] The Appellants' ill-fated attempt to appeal the district court of appeal per curiam opinion directly to the Florida Supreme Court resulted in the appeal being dismissed sua sponte by an order of the Florida Supreme Court filed on May 27, 1988 (A 14). The fact that one of the stated grounds for the summary dismissal of the appeal by the Florida Supreme Court was that ". . . the notice was not timely filed . . ." (A 14) compels the conclusion that the Florida Supreme Court also treated the Appellants' Motion for Rehearing En Banc, etc., as a nullity for purposes of computing the 30 day time period for filing a notice of appeal under Rule 9.110(b), Fla.R.App.P.

II

This appeal should be dismissed on the alternative ground that denial under Florida law of homestead exemption tax relief to real property used only as a temporary residence does not present a substantial federal question.

Even if this Court were to somehow determine that the appeal was timely filed and that jurisdiction existed, the Appellees submit that the Appeal should still be dismissed for lack of a substantial federal question. One of the conclusions set forth in the summary final judgment of the trial court was that:

> 3. Plaintiffs failed to cite to the court any statutes or case law of Florida holding that similar property owned by a permanent resident of Florida and occupied only periodically during the year as a seasonal or vacation dwelling would be entitled to the homestead tax exemption under Florida law. (Jur. Stat. A-7)

This conclusion of the trial court is eminently correct because the Appellants totally failed to demonstrate that the "permanent residence" requirement for homestead exemption tax relief under Florida

law discriminates, in any way, against non-residents. Furthermore, as clearly reflected on the face of the summary final judgment (Jur. Stat. A-6), the trial court's findings and rulings were based solely on the pleadings of record and legal argument of counsel for the respective parties. **Thus, absolutely no testimony or documentary evidence was presented to the trial court that the Collier County Property Appraiser had ever granted a homestead tax exemption to a second dwelling owned by a permanent resident of Florida and used only as a temporary residence.**

The constitutional provisions of Art. VII, s.6(a), Fla. Const., and the corresponding statutory provisions of Section 196.031(1), Fla. Stat. (1985), plainly limit homestead exemption tax relief to property upon which is maintained the "permanent residence" of the owner (or others naturally or legally dependent upon the owner). Notwithstanding these clear constitutional and statutory provisions to the contrary, the Appellants maintain their spurious contention that the subject temporary residence would have been entitled to

homestead exemption tax relief under Florida law if the property had been owned by a resident of this state who had a "permanent home" in another county and, like the Appellants here, used the property as a temporary residence.

However, it is abundantly clear under Florida law that a permanent resident of Florida is only allowed homestead exemption tax relief on one dwelling declared to be his or her "permanent residence", even if the Florida resident owns two or more dwellings also located in the state. See, Department of Revenue Rule 12D-7.007(5) F.A.C.; and 51 Fla.Jur.2d, Taxation, s. 20:133.

The pertinent provisions of Rule 12D-7.007(5), F.A.C., provide that the ". . . [Florida] Constitution contemplates that one person may claim only one homestead exemption without regard to the number of residences owned by him . . ." The treatise on Taxation as set forth at 51 Fla.Jur.2d, Taxation, s.20:133 is also in accord by stating in pertinent part that ". . . Only one exemption is allowed any individual or family unit or with respect to any

residential unit.. . . A person applying for a homestead exemption who resides in another county must present competent evidence that he is only claiming the homestead exemption in one county to be eligible for the exemption" (footnotes omitted). Id., at pages 871-872.

It is evident from Department of Revenue Rule 12D-7.007(5), F.A.C., and the cited section from 51 Fla.Jur.2d, Taxation §20:133, that **the subject real property would not be entitled to homestead exemption tax relief even if the property were owned by a permanent resident of Florida and (like the Appellants) used only as a temporary, seasonal residence.** Thus, the Appellants' suggestion to the contrary is utterly devoid of any legal or factual basis.

The weakness of the Appellants' legal position is illustrated by their misplaced reliance on the recent decision of the Florida Supreme Court in the consolidated cases of Public Health Trust of Dade County v. Lopez, and Mary Helen Hines, etc. v. Gessler Clinic, P.A., et al., 13 Fla. Law Weekly 377 (Fla. 1988). In the Public

Health Trust and Hines cases, the sole issue before the court was whether, under current Florida constitutional provisions, the two homesteads were exempt from claims of creditors where there were no minor children or adult dependent children. This question was answered in the affirmative by the Florida Supreme Court.

There were no federal constitutional claims under the Privileges and Immunities and Equal Protection Clauses presented in the Public Health Trust and Hines cases. Furthermore, neither of the decedent homeowners were nonresidents of Florida. In addition, it was undisputed in the Public Health Trust and Hines cases that the dwellings in question were being occupied as the permanent residences of the decedents at the time of their deaths.

The conclusion that a state law limiting homestead tax relief to property used as a "permanent residence" is totally nondiscriminatory with respect to nonresidents was also expressly approved by the Supreme court of New Jersey in the controlling case of Rubin v. Glaser, 416 A.2d 382 (N.J. 1980), appeal dismissed for want of a

substantial federal question at 449 U.S. 997, 101 S.Ct. 389, 66 L.Ed.2d 239 (1980).

In its opinion in the Rubin v. Glaser, supra, decision, the New Jersey Supreme Court succinctly observed that:

> Second, this statutory aim was not directed against nonresidents. Thus, New Jersey residents who do not own a principal residence in the State are on the same footing as nonresidents. For example, a New Jersey resident whose principal place of residence is a rented apartment would not receive a rebate on a home he owned at the New Jersey shore. Moreover no one is entitled to a rebate of taxes paid on a second home. Thus, plaintiffs are treated the same as New Jersey residents who own a second home for summer vacations in New Jersey with respect to rebates on that second home. (e.s.)

Id., at pages 386-367 (A. 11-12).

Like the New Jersey Homestead Rebate Act, the Florida homestead tax exemption provisions do not apply to a "temporary" residence which is not the permanent homestead of the owner, whether the temporary residence is owned by a resident of Florida or by a resident of another state. Consequently, the Appellants' constitutional claims should be summarily dismissed for

lack of a substantial federal question, since no discrimination whatsoever has been shown with respect to the application of Florida's homestead tax laws to dwellings used only as a temporary residence by either a resident or nonresident of this state.

Furthermore, constitutional claims identical to those presented by the Appellants here were also expressly rejected in Rubin v. Glaser, supra. In the Rubin case, the plaintiffs were residents of Pennsylvania who also owned a "second" house in New Jersey. Like the subject property, the New Jersey house was occupied by the Rubins in the summer and periodically during other times of the year as a vacation home. The Rubins were denied a homestead tax rebate with respect to real property taxes paid on their vacation home.

The Rubins then challenged the constitutionality of the New Jersey Homestead Rebate Act asserting, among other claims, that the act violated the Privileges and Immunities Clause and the Equal Protection Clause of the United States Constitution.

However, the Rubins' constitutional claims were expressly rejected by the New Jersey Supreme Court in its opinion in the Rubin case.

The subsequent appeal of the New Jersey Supreme Court Rubin decision to this Court was dismissed for want of a substantial question at 449 U.S. 997, 101 S.Ct. 389, 66 L.Ed.2d 239 (1980). Thus, the dismissal of the Rubin appeal for lack of a substantial federal question constitutes a ruling on the merits by this Court in the sense that the dismissal represents the view that the judgment appealed from was correct as to the federal questions raised and necessary to the decision. Washington v. Confederated Bands and Tribes, 439 U.S. 463, at 476 n.20, 99 S.Ct. 940, 58 L.Ed.2d 740 (1979); and Hicks v. Miranda, 422 U.S. 332, 343-345, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975).

It is significant that the provisions of the New Jersey Homestead Rebate Act construed in the Rubin decision are quite similar to the provisions of the Florida constitutional and statutory Homestead Exemption Provisions with respect to the "permanent residence" requirement. The New

Jersey Homestead Rebate Act reads in pertinent part as follows:

> Every citizen and resident of this State shall be entitled, annually, to a homestead rebate on a dwelling house and the land upon which such dwelling house is situated, or on a dwelling house assessed as real estate situated on land owned by another or others **which constitutes the place of his domicile and which is owned and used by him as his principal residence.** N.J.S.A. 54:4-3:80(a); (emphasis added)

The New Jersey Supreme Court rejected the Privileges and Immunities claim by observing in the Rubin opinion as follows:

> A principle which may be derived from these decisions is that state taxing statutes, conferring a benefit or advantage only on residents, do not run afoul of the Privileges and Immunities Clause, provided they bear a "close" or "substantial relationship" to a legitimate purpose independent of discrimination against nonresidents. Hicklin v. Orbeck, 437 U.S. at 525, 527, 98 S.Ct. at 2488, 2489, 57 L.Ed.2d at 404, 405; Toomer v. Witsell, 334 U.S. at 396, 68 S.Ct. at 1162, 92 L.Ed. at 1471. The Homestead Rebate Act satisfies the requirements of the Privileges and Immunities Clause, bearing a close relationship to a proper purpose irrespective of the impact upon nonresidents.

> . . . we emphasize that the Act's application solely to principal places of residence is closely related to the beneficent purpose of alleviating the heavy realty tax burden. As Judge Morgan wrote for the Appellate Division, the rebate was meant to assist "the taxpayer in times of escalating property taxes to keep a roof over his head." 166 N.J. Super. at 265, 399 A.2d at 988. The Legislature did not intend to foster ownership of property for a second home to be used for vacations or for purposes other than maintaining a principal residence. (e.s.)

Id., at page 385

In the Rubin opinion, the New Jersey Supreme Court also rejected the plaintiffs' Equal Protection claim by stating in pertinent part on pages 387-388 of the opinion that:

> Plaintiffs' contention with respect to the Equal Protection Clause is equally without merit. There has been no meaningful restriction on their fundamental right to travel and so the burden does not rest upon the State to establish a compelling state interest to justify the law. The Homestead Rebate Act does not penalize the exercise of the right to travel. That right is penalized when nonresidents are denied "a basic necessity of life" or a "fundamental" right . . .. (Citations omitted.) Denial of homestead rebate on a vacation home does not rise to the level of a deprivation

of "a basic necessity of life" or of a "fundamental" right. Furthermore, the homestead rebate is not denied to those persons, and only those persons, who have exercised their constitutional right of interstate migration. See Dunn v. Blumstein, 405 U.S. at 338, 92 S.Ct. at 1001, 31 L.Ed.2d at 281-282. Moreover, the Act contains no residential durational element of the type which has been invalid where the individual has been required to have resided within the state for a minimum period of time. The Supreme Court has expressly noted that in the absence of a durational residency issue, it did "not intend to 'cast doubt on the validity of appropriately defined and uniformly applied bona fide residence.'" Memorial Hosp. v. Maricopa Cty., 415 U.S. at 255, 94 S.Ct. at 1081, 39 L.Ed.2d at 313, quoting Dunn v. Blumstein, 405 U.S. at 342 n.13, 92 S.Ct. at 1003 n.13, 31 L.Ed.2d at 284 n.13. This being so, the statute need not be measured by the strict scrutiny standards. . . . We agree fully with Judge Morgan, writing for the Appellate Division below, that:

> The classification here evidences the Legislature's attempt to blunt escalating property taxes that threaten a family's ability to continue living in their home. We have no doubt that lessening tax burdens for that essential reason, and denying relief to less essential types of residential property ownership, is well within the Legislature's discretion. (e.s.)

The Appellants' vain attempt to distinguish the obviously adverse holding of the Rubin decision is far less than convincing. The fact that the New Jersey Homestead Rebate Act was passed in conjunction with the New Jersey Gross Income Tax Act had absolutely nothing to do with the rationale or the holding of the Court in the Rubin opinion. Indeed, the brief reference to the New Jersey Gross Income Tax Act was expressly noted "In passing . . ." in one paragraph in the detailed five-page Rubin opinion and was never mentioned again! Id., at 416 F.2d 387.

The Appellants cite various cases in their Jurisdictional Statement purporting to support their position that the Florida constitutional and statutory provisions limiting homestead tax relief to real property used as a "permanent residence" by the owner (or dependents) violate the Privileges and Immunities and Equal Protection Clauses of the United States Constitution. However, not one of the cases cited by the Appellants holds that a state law denying homestead tax relief to

dwellings used only as temporary residences is constitutionally impermissible.

Substantially all of the cases cited in the Appellants' Jurisdictional Statement deal with such obvious "fundamental" activities as a right of a nonresident to earn a livelihood or the right of a foreign corporation to transact business in another state. Typical of the "right to earn a livelihood" cases is the recent decision of this Court in Supreme Court of Virginia v. Friedman, 108 S.Ct. 2260 (1988). Another line of cases cited by the Appellants deals with claims by foreign corporations of discriminatory taxation with respect to business activities transacted in the nondomiciliary state. See, e.g., Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985).

The Appellees submit that none of these "right to transact business" or "right to earn a livelihood" cases relied upon by the Appellants are applicable to or controlling upon the disposition of this appeal. There was never any contention presented by the Appellants to the state courts that the subject temporary residence was used by the

Appellants as a place for the transaction of business or of earning a livelihood in the State of Florida.[3]/

A third category of decisions set forth in the Appellants' Jurisdictional Statement is typified by the "right to travel" decision of this Court in Williams v. Vermont, 472 U.S. 14, 105 S.Ct. 2465, 86 L.Ed.2d 11 (1985). However, as expressly acknowledged by the New Jersey Supreme Court in Rubin v. Glaser, supra, homestead tax relief **does not penalize the right to travel!** Id., at page 387.

The Rubin opinion also quotes from one of the leading decisions of this Court in recent years dealing with the Privileges and Immunities Clause of the U.S. Constitution, i.e., Baldwin v. Fish & Game Commission of Montana, 436 U.S. 371, 98 S.Ct.

[3]/ The Appellant, Peter Herzog, is a lawyer and member of both the Missouri Bar and the Florida Bar. However, Mr. Herzog never asserted in any pleading or legal argument in the state courts that his temporary residence located in Collier County, Florida, was also used as a professional office from which he practiced law in Florida.

1852, 56 L.Ed.2d 354 (1978). In the Baldwin case, this Court upheld the constitutionality of a Montana hunting license provision which imposed substantially higher license fees on nonresidents. The Montana Supreme Court concluded in the Baldwin opinion as follows:

> Appellants' interest in sharing this limited resource on more equal terms with Montana residents of the Privileges and Immunities Clause. Equality in access to Montana elk is not basic to the maintenance or well-being of the Union. appellants do not -- and cannot -- contend that they are deprived of a means of a livelihood by the system or of access to any part of the State to which they may seek to travel. . . . (e.s.)

The validity of the conclusion that the ownership by a nonresident of a temporary residence in another state is a luxury rather than a "basic necessity of life" would appear to be beyond serious question. Certainly, the occupancy of a seasonal residence on the Gulf Coast of Florida by Missouri residents cannot be reasonably characterized as being a "fundamental" activity comparable in nature to the basic

right of interstate travel or right to earn a livelihood in a non-domiciliary state.

Since the occupancy by a nonresident of a dwelling as a temporary residence is not 'basic to the very livelihood of the Nation', the homestead tax exemption must be sustained if the Florida Legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose. Exxon Corp. v. Eagerton, 462 U.S. 176, 196, 103 S.Ct. 2296, 76 L.Ed.2d 497 (1981).

There is an obvious legitimate state purpose in imposing a "permanent residence" requirement as a condition precedent to granting homestead tax exemption relief. The basic $5,000 homestead tax exemption was adopted in the year 1934 during the Depression era as former Art. X, Sec. 7, Fla.Const. (1885). Most of the substance of that section was carried over into the 1968 Revision of the Florida Constitution, to form the current Art. VII, Sec. 6. In 1980, the constitutional provisions of Art. VII, Sec. 6 were amended to authorize an increase to $25,000 of the homestead exemption.

When the homestead exemption provisions of former Art. X, Sec. 7 and current Art. VII, s. 6, Fla.Const., are viewed in historical perspective, the clear intent of these provisions to afford the basic "homestead" necessary for maintaining shelter for the family unit some economic protection from the full impact of tax liability is apparent.[4]/

Since the Appellants admittedly have their permanent home in the State of Missouri, it seems evident that their "temporary residence" in Collier County, Florida, does not fall within the classification of a "basic homestead" which is the object of the tax exemption relief under the challenged constitutional and statutory provisions. Consequently, the "permanent residence" requirement under attack here as a condition precedent to entitlement to homestead exemption tax relief in Florida does

[4]/ The court in Rubin recognized that the comparable homestead rebate in New Jersey had the beneficent purpose of assisting "the taxpayer in times of escalating property taxes to keep a roof over his head". Id., 416 A.2d 386.

have a reasonable relationship to a legitimate state purpose and does not violate any federal constitutional standards.

CONCLUSION

The Appellees respectfully submit that this appeal should be dismissed for lack of jurisdiction because the notice of appeal was untimely; and/or want of a substantial federal question or, in the alternative, that the opinion of the District Court of Appeal of Florida, Second District, should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

J. Terrell Williams

J. TERRELL WILLIAMS
Assistant Attorney General

DEPARTMENT OF
LEGAL AFFAIRS
The Capitol - Suite 1501
Tallahassee, FL 32399-1050
(904) 488-1573

APPENDIX

APPENDIX

STATUTORY AND RULE PROVISIONS INVOLVED

28 U.S.C. §2101. Supreme Court; time for appeal or certiorari; docketing; stay

* * * * *

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

* * * * *

Rule 35. Fed.R.App.P. Determination of Causes by the Court in Banc

* * * * *

(c) Time for Suggestion of a Party for Hearing or Rehearing in Banc; Suggestion Does Not Stay Mandate. If a party desires to suggest that an appeal be heard initially in

banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

Supreme Court Rule 11. Appeal, cross-appeal -- time for taking

* * * * *

.3. The time for filing the notice of appeal runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the

case, the time for filing the notice of appeal for all parties (whether or not they requested rehearing or joined in the petition for rehearing, or whether or not the petition for rehearing relates to an issue the other parties would raise) runs from the date of the denial of rehearing or the entry of a subsequent judgment.

* * * * *

Rule 9.125, Fla.R.App.P. Review of Trial Court Orders and Judgments Certified by the District Courts of Appeal Requiring Immediate Resolution by the Supreme Court

* * * * *

(c) Suggestion. Any party may file with the district court and serve on the parties a suggestion that the order to be reviewed should be certified by the district court to the Supreme Court. The suggestion shall be substantially in the form prescribed by this rule and shall be filed within ten days from the filing of the notice of appeal.

* * * * *

Rule 9.330, Fla.R.App.P. Rehearing; Clarification

(a) Time for Filing; Contents; Reply. A motion for rehearing or for clarification of decision may be filed within 15 days of an order or within such other time set by the court. The motion shall state with particularity the points of law or fact which the court has overlooked or misapprehended. The motion shall not re-argue the merits of the court's order. A reply may be served within 10 days of service of the motion.

(b) Limitation A party shall not file more than one such motion with respect to a particular decision.

* * * * *

Rule 9.331, Fla.R.App.P. Determination of Causes in a District Court of Appeal En Banc

* * * * *

(c) Rehearings En Banc.

(1) Generally. A rehearing en banc may be ordered by a district court of appeal on its own motion or on motion of a party.

Within the time prescribed by Rule 9.330 and in conjunction with the motion for rehearing, a party may move for an en banc rehearing solely on the grounds that the case is of exceptional importance or that such consideration is necessary to maintain uniformity in the court's decisions. A motion based on any other ground shall be stricken. A vote will not be taken on the motion unless requested by a judge on the panel that heard the proceeding, or by any judge in regular active service on the court. Judges who did not sit on the panel are under no obligation to consider the motion unless a vote is requested.

* * * * *

Rule 12D-7.007, Fla.Adm.Code. Homestead Exemptions -- Residence Requirement

* * * * *

(5) The Constitution contemplates that one person may claim only one homestead exemption without regard to the number of

residences owned by him and occupied by "another or others naturally dependent upon" such owner. This being true no person residing in another county should be granted homestead exemption unless and until he presents competent evidence that he only claims homestead exemption from taxation in the county of the application.

51 Fla.Jur., Taxation, §20:133. Multiple residences get only one exemption

Only one exemption is allowed any individual or family unit, or with respect to any residential unit. Thus, one person may claim only one homestead exemption without regard to the number of residences owned by him and occupied by another or others naturally dependent upon the owner. A person applying for a homestead exemption who resides in another county must present competent evidence that he is only claiming the homestead

exemption in one county to be eligible for the exemption. (Citations omitted.)

Rule 9.020, Fla.R.App.P. Definition

* * * * *

(g) Rendition (of an order): the filing of a signed, written order with the clerk of the lower tribunal. Where there has been filed in the lower tribunal an authorized and timely motion for new trial or rehearing, to alter or amend, for judgment in accordance with prior motion for directed verdict, notwithstanding verdict, in arrest of judgment, or a challenge to the verdict, the order shall not be deemed rendered until disposition thereof.

* * * * *

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

PETER W. HERZOG AND
JOAN L. HERZOG,

Appellants, Case No. 87-1056

v.

SAM L. COLDING, as Collier
County Property Appraiser,
and DEPARTMENT OF REVENUE
OF THE STATE OF FLORIDA,

Appellees.

MOTION FOR REHEARING EN BANC OR,
IN THE ALTERNATIVE, FOR CERTIFICATION
TO THE SUPREME COURT AS A
QUESTION OF GREAT PUBLIC IMPORTANCE

COMES NOW Appellants and move this Court for its Order granting a rehearing En Banc and in so moving, Appellants state that an En Banc decision in this case is necessary because the Opinion by the Division, copy of which is attached, does not address the significant Constitutional issues raised by Appellants in their appeal from the order of the Circuit Court and more particularly described as follows:

1. Florida Statute Section 196.031(3) and Article VII, Section 6 granting a homestead allowance in the amount of $25,000.00 to all residents of the State of Florida

and denying same to all non-residents because of their non-residency is violative of Article IV, Section 2 of the United States Constitution;

2. Florida Statute Section 196.031(3) and Article VII, Section 6 is violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and

3. Florida Statute Section 196.031(3) and Article VII, Section 6 is violative of Article I, Section 2 of the Florida Constitution.

Appellants further state that without opinion of this Court it will be more difficult for the Supreme Court of Florida, to which Apellants intend to move for review should this Court not grant relief, to understand the reasoning and considered opinion of this Court. As a further reason for granting the relief asked for in this Motion, Appellants state that should this Court not grant a rehearing and should the Supreme Court of Florida not grant a review of this case, the important Constitutional issues involved in this case will be ad-

dressed, for the first time, in the Supreme Court of the United States without the opinion of the Florida Courts as to the propriety of their Statutes, which may, at the very least, conflict with the Constitution of the State of Florida.

Appellants further move that this Court certify this case and the issues presented therein to the Supreme Court of Florida for the same reasons as stated above and for the reason that the issues contained within the case are of great public importance.

COMES NOW Peter W. Herzog, Jr., who being first duly sworn upon his oath deposes and states that he is one of the Appellants herein and counsel for both Appellants, and that the motions herein made by Appellants are made after a review by him of the facts and circumstances of the case and the applicable law therein. Affiant further states that the issues sought to be certified to the Supreme Court of Florida are issues which he believes, based on a reasoned and studied professional judgment, require immediate resolution by the Supreme Court of Florida and are of great public importance, and Affiant

further states that he has a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

/s/
Peter W. Herzog

Subscribed and sworn to before me this 22nd day of March, 1988.

/s/
Notary Public

My Commission Expires: My Commission Expires Sept. 11, 1989

Respectfully submitted,

CARUTHERS, HERZOG, CREBS & MCGHEE

By: /s/
Peter W. Herzog - #307661
555 Washington Avenue
6th Floor
St. Louis, MO 63101
(314) 231-6700

OF COUNSEL:

Leo J. Salvatori
Quarles & Brady
The Four Hundred Building
400 Fifth Avenue South, Suite 301
Naples, Florida 33940-6597
(313) 262-5959

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Rehearing En Banc or, in the Alternative, for Certification to the Supreme Court as a Question of Great Public Importance, has been furnished by mail to J. Terrell Williams, Assistant Attorney General, Department of Legal Affairs, Tax Section, Capitol Building, Tallahassee, Florida 32399-1050; and to Leo J. Salvatori, Esq., The Four Hundred Building, 400 Fifth Avenue South, Suite 301, Naples, Florida 33940; and to James Siesky, Esq., 791 Tenth Street South, Naples, Florida 33940, on this 22nd day of Marcy, 1988.

/s/

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

APRIL 27, 1988

PETER W. HERZOG AND
JOAN L. HERZOG,

Appellants, Case No. 87-1056

v.

SAM L. COLDING, as Collier
County Property Appraiser,
and DEPARTMENT OF REVENUE
OF THE STATE OF FLORIDA,

Appellees.

Appellants having filed a motion for rehearing en banc or, in the alternative for certification to the Supreme Court as a question of great public importance in the above-styled case, upon consideration, it is

ORDERED that said motion is hereby denied.

A TRUE COPY
ATTEST:
/s/
WILLIAM A. HADDAD, CLERK
SECOND DISTRICT COURT OF APPEAL

cc: Peter W. Herzog
J. Terrell Williams
Leo J. Salvatori, Esq.
James Siesky, Esq.

SUPREME COURT OF FLORIDA
FRIDAY, MAY 27, 1988

PETER W. HERZOG AND
JOAN L. HERZOG,

Appellants,

v.

SAM L. COLDING, as Collier County Property Appraiser, and DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,

Appellees

Case No. 72,485

District Court of Appeal 2d District - No. 87-1056

It appearing to the Court that the notice was not timely filed and further that the District Court of Appeal, Second District, did not declare invalid a State Statute or a provision of the State Constitution, and that, therefore, it is without jurisdiction, this appeal is hereby dismissed subject to reinstatement if timeliness and jurisdiction are established on proper motion filed within fifteen (15) days from the date of this order. See Article V, Section 3(b)(1), Florida Constitution.

TC
cc: Hon. William A. Haddad, Clerk
Hon. William C. McIver, Judge
Hon. James C. Giles, Clerk

Peter W. Herzog, Esquire
Leo J. Salvatori, Esquire
James H. Siesky, Esquire
J. Terrell Williams, Esquire

No. 88-171

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PETER W. HERZOG and JOAN L. HERZOG,
Appellants,

vs.

SAM J. COLDING, as Collier County Property Appraiser, and the DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,
Appellees.

On Appeal from the Second District Court of Appeal, Lakeland Florida

APPELLANTS' BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

PETER W. HERZOG, JR.
Counsel of Record
555 Washington Avenue
Sixth Floor
St. Louis, Missouri 63101
(314) 231-6700

KATHRYN A KLEIN
CARUTHERS, HERZOG, CREBS & McGHEE
555 Washington Avenue
Sixth Floor
St. Louis, Missouri 63101
(314) 231-6700

Counsel for Appellants

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

STATEMENT OF ISSUES

I. THIS APPEAL SHOULD NOT BE DISMISSED AS UNTIMELY IN THAT APPELLANTS' NOTICE OF APPEAL AND JURISDICTIONAL STATEMENT WERE FILED WITHIN 90 DAYS OF THE FINAL ACT OF THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA, WHICH WAS ENTERED ON APRIL 27, 1988.

II. THIS APPEAL SHOULD NOT BE DISMISSED IN THAT A SUBSTANTIAL FEDERAL QUESTION HAS BEEN PRESENTED.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PETER W. HERZOG and JOAN L. HERZOG,
Appellants,

vs.

SAM J. COLDING, as Collier County Property Appraiser, and the DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,
Appellees.

On Appeal from the Second District Court of Appeal, Lakeland Florida

APPELLANTS' BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

ARGUMENT

I.

THIS APPEAL SHOULD NOT BE DISMISSED AS UNTIMELY IN THAT APPELLANTS' NOTICE OF APPEAL AND JURISDICTIONAL STATEMENT WERE FILED WITHIN 90 DAYS OF THE FINAL ACT OF THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA, WHICH WAS ENTERED ON APRIL 27, 1988.

Initially, Appellees criticize Appellants for citing in the Notice of Appeal both the per curiam opinion of the Second District Court of Appeal of Florida and the court's Order denying their Motion for Rehearing En Banc or, in the Alternative, for Certification to the Supreme Court of Florida as a Question of Great Public Importance. Appellees contend that an order denying a a motion for rehearing is a non-appealable order and only the per curiam opinion could be appealed. Appellants, however, referenced both the opinion and the order of denial, being the last act of the highest court in Florida in which review could be had, to demonstrate not only that the time for filing this appeal had been tolled while the District Court of Appeal entertained the motion for rehearing en banc, but also that Appellants had extinguished their avenues for review in the Florida state courts.

Appellees also argue that Appellants' motion for rehearing en banc failed to toll the time for filing this appeal because it was a non-allowable motion and a nullity. Appellees rely on *State v. Kilpatrick*, 420 So.2d 868 (Fla. 1982) and *La Grande v. B & L Services, Inc.*, 436 So.2d 337 (Fla.Dist.Ct.App. 1983) and maintain that the courts therein considered circumstances identical to those present in the instant case. Actually, however, the facts before those courts differ in one significant aspect - the disposition of the motion for rehearing en banc by the district courts of appeal.

In both *Kilpatrick* and *La Grande*, the district courts of appeal refused to exercise jurisdiction over the motions for rehearing en banc and administratively dismissed the motions. *State v. Kilpatrick*, 420 So.2d at 868; *La Grande v. B & L Services, Inc.*, 436 So.2d at 337. The Florida Supreme Court in *Kilpatrick* stated:

> The en banc rule, by its express provisions, *does not require a district court to respond* to a request for rehearing en banc. If we accepted the state's contention, however, it

> would mean that the district courts of appeal would be compelled to respond, even though the rule clearly states a vote will not be taken on an en banc rehearing motion unless requested by a judge.

State v. Kilpatrick, 420 So.2d at 869 (emphasis added). In the present case, however, the Second District Court of Appeal *did respond* to Appellants' motion for rehearing en banc, even though not required to do so. The Second District Court of Appeal entertained Appellants' motion and held that "*upon consideration*, it is ORDERED that said motion is hereby *denied*." *See* Appendix B, Appellants' Jurisdictional Statement (emphasis added).

In *La Grande* the appellant's argument suggests that denials of rehearings en banc are treated differently than dismissals of rehearings en banc. The appellant had argued that the dismissal of his motion for rehearing en banc in *La Grande* should be given the same effect as was given to a denial of a motion for rehearing en banc in an unrelated case. Presumably, in the prior case, the denial had served as the act from which the time to appeal had begun to run and the appellant maintained that the dismissal should have the same effect. The court, however, disagreed. *La Grande v. B & L Services, Inc.*, 436 So.2d at 337.

The distinction is clear. An administrative mandate dismissing a motion for lack of jurisdiction is procedurally quite different from an order denying a motion upon consideration. Since the Second District Court of Appeal entertained and passed judgment on Appellants' motion, Appellants correctly relied upon this Order and considered this to be the final act of the court from which the time for appeal was to be measured.

II.

THIS APPEAL SHOULD NOT BE DISMISSED IN THAT A SUBSTANTIAL FEDERAL QUESTION HAS BEEN PRESENTED.

Appellees' argument in Section II of their motion indicates that they still have failed to recognize the constitutional deficiency of Florida's tax exemption. Appellees neglected to address in their Motion to Dismiss or Affirm in what way non-residents of Florida constitute a "peculiar source of the evil" at which the constitutional and statutory provisions in issue are aimed.

Appellees rely solely on *Rubin v. Glaser*, 416 A.2d 382 (N.J.), *appeal dismissed*, 449 U.S. 997, 101 S.Ct. 389, 66 L.Ed.2d 239 (1980) as they did in the Florida state courts. Realizing that Appellees would again analogize Florida's tax exemption to New Jersey's tax rebate, Appellants sought to distinguish this specious argument by drawing the Court's attention to the differing aspects of New Jersey's Homestead Rebate Act which allowed it to withstand constitutional scrutiny. Namely, the rebate act counterbalanced a corresponding income tax burden borne by New Jersey residents and the operation of the Homestead Tax Rebate Act was contingent upon the passage of the Gross Income Tax Act, both of which acts were enacted simultaneously. *Id.* at 387. Thus, the *Rubin* court recognized that tax burdens imposed on non-residents are only constitutional when they are in proportion to specific benefits conferred on non-residents or burdens shouldered particularly by residents. *Id.* at 385-86 (citing *Travelers' Insurance Co. v. Connecticut*, 185 U.S. 364, 22 S.Ct. 673, 46 L.Ed. 949 (1902)).

Appellants are not alone in recognizing the significance of New Jersey's Gross Income Tax Act on the validity of the Homestead Rebate Act. The Supreme Court of Massachusetts in *Massachusetts Council of Construction Employers, Inc. v. Mayor of Boston*, 425 N.E.2d 346 (Mass. 1981) cited *Rubin* for

the proposition that a "[s]tate may treat residents and non-residents differently for some tax purposes, if such treatment bears a close relation to extra taxes paid by residents in other contexts." *Id.* at 351; *see also Opinion of the Justices to the Senate,* 469 N.E.2d 821, 825 n.7 (Mass. 1984). This requirement that tax burdens and benefits must be borne proportionally by non-residents and residents is essential to the appropriate Privileges and Immunities inquiry articulated by this Court consistently since *Tappan v. Merchants' National Bank,* 19 Wall. 490, 22 L.Ed. 189 (1874). Florida's tax exemption fails to meet this constitutional standard.

Although Appellants discussed in their Jurisdictional Statement numerous Supreme Court cases in support of this argument for the invalidity of Florida's tax exemption, Appellees criticize Appellants for reliance on cases referred to in the Motion to Dismiss or Affirm as "right to transact business," "right to earn a livelihood" and "right to travel." Appellants reliance on such cases, however, was necessitated by the absence of any Supreme Court determination concerning the right to own a home in a state where one lacks citizenship. This void in the case law only demonstrates that the instant case presents a substantial federal question requiring this Court's attention and opinion on the merits. Florida's sole reliance on the *Rubin* case, though clearly in error, evidences how *Rubin* may be misconstrued and relied upon as precedent due to this Court's dismissal of that appeal for lack of a substantial federal question and the absence of any full opinion on this issue. Moreover, if the appeal in the instant case is dismissed for lack of a substantial federal question, this Court will be offering its stamp of approval to any taxing scheme preceded by the word "Homestead."

CONCLUSION

Appellants pray this Court to note probable jurisdiction in that the Notice of Appeal was filed within ninety days of Florida's final order denying Appellant's motion for rehearing en banc and because this appeal presents a substantial federal question for this Court's determination.

Respectfully submitted,

Peter W. Herzog, Jr.
Counsel of Record
555 Washington Avenue
Sixth Floor
St. Louis, Missouri 63101
(314) 231-6700

Kathryn A. Klein
Caruthers, Herzog, Crebs & McGhee
555 Washington Avenue
Sixth Floor
St. Louis, Missouri 63101
(314) 231-6700

Counsel for Appellants

No. 88-171

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PETER W. HERZOG and JOAN L. HERZOG,
Appellants,

vs.

SAM J. COLDING, as Collier County Property Appraiser, and the DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,
Appellees.

On Appeal From the Second District Court of Appeal, Lakeland Florida

APPELLANTS' SUPPLEMENT TO THEIR BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

PETER W. HERZOG, JR.
Counsel of Record
555 Washington Avenue
Sixth Floor
St. Louis, Missouri 63101
(314) 231-6700

KATHRYN A. KLEIN
CARUTHERS, HERZOG, CREBS & McGHEE
555 Washington Avenue
Sixth Floor
St. Louis, Missouri 63101
(314) 231-6700
Counsel for Appellants

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

8 pp

ON SEPTEMBER 1, 1988, THE SUPREME COURT OF FLORIDA ISSUED AN ADVISORY OPINION TO THIS COURT WHICH APPELLANTS BELIEVE IS RELEVANT TO THIS APPEAL AND SHOULD BE BROUGHT TO THIS COURT'S ATTENTION AS A SUPPLEMENT TO THEIR BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PETER W. HERZOG and JOAN L. HERZOG,
Appellants,

vs.

SAM J. COLDING, as Collier County Property Appraiser,
and the DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,
Appellees.

On Appeal From the Second District Court of Appeal,
Lakeland Florida

APPELLANTS' SUPPLEMENT TO THEIR BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

ON SEPTEMBER 1, 1988, THE SUPREME COURT OF FLORIDA ISSUED AN ADVISORY OPINION TO THIS COURT WHICH APPELLANTS BELIEVE IS RELEVANT TO THIS APPEAL AND SHOULD BE BROUGHT TO THIS COURT'S ATTENTION AS A SUPPLEMENT TO THEIR BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

On September 1, 1988, the Supreme Court of Florida addressed a question of law certified from this Court in the case of *The Florida Star v. B.J.F.*, Case No. 87-329. The certified ques-

tion concerned the jurisdiction of the Florida Supreme Court to hear the appeal to that court as it related to the timeliness of the appeal to the United States Supreme Court. Since the Appellees in the instant case have similarly attacked the timeliness of this appeal, the opinion of the Florida Supreme Court in *The Florida Star v. B.J.F.*, No. 71-615 (Fla. Sept. 1, 1988) is relevant.

In *The Florida Star v. B.J.F.*, Appellee argued in her motion to dismiss the appeal before this Court that the opinion of the First District Court of Appeal was the final decision of the highest state court empowered to hear the cause and so, the time in which to appeal to the United States Supreme Court would run therefrom. *B.J.F.*, slip op. at 2-3. The Appellant, however, had appealed to the Supreme Court of Florida and judged that the state court remedies were not exhausted until such review was denied. Similarly, the Appellants herein moved the Second District Court of Appeal for a rehearing en banc and, accordingly, measured the time for appeal from the court's denial of their motion, after consideration thereof.

The Florida Supreme Court determined that it did have discretionary jurisdiction to hear the appeal in *B.J.F.* and that its jurisdiction was not complete until the court refused to exercise its discretion. *Id.* at 3-5. The court held that the denial of review did not retroactively remove the jurisdiction of that court, but merely marked the end of its jurisdiction. *Id.* at 5. In the case at bar, the Second District Court of Appeal was empowered to grant Appellants a rehearing en banc; the denial of this review did not reinstate the per curiam opinion as the court's last act. Rather, the order denying the rehearing en banc was the final decision which exhausted Appellants' state court remedies.

The Supreme Court of Florida in *B.J.F.* expounded upon the equitable principles which were considered in determining that jurisdiction is retained until a final review is denied and stated that:

> We confess that we are much influenced in this holding by the procedural quagmire that would result from a negative answer. To seek review of a state court judgment in the United States Supreme Court, a litigant first must exhaust all avenues of review available in the courts of the state. The fact that review in the highest court is discretionary is irrelevant; the litigant still must seek such review in order to proceed to the United States Supreme Court.
>
> It is therefore essential to the preservation of a litigant's right to United States Supreme Court review that he or she know with certainty the avenues of appellate review required by the courts of the state. If, after the fact, we held in a case such as this that there was no jurisdiction, litigants would be placed in a needlessly burdensome position. A party would have to try to predict which court ultimately would recognize jurisdiction in the case and file a petition for review accordingly.

Id. (citations omitted).

The argument of Appellees herein, that the order denying Appellants' motion for rehearing en banc was not the last act of the Second District Court of Appeal, contravenes equitable principles. An acceptance of Appellees' argument would result in the same procedural confusion berated by the Florida Supreme Court in *B.J.F.* Appellants relied on the representations contained on the face of the Second District's order, clearly demonstrating that the court had accepted jurisdiction, had considered Appellants' motion and had denied same. The Second District did not dismiss the motion for lack of jurisdiction, which would have alerted Appellants to make an earlier filing in this Court as Appellees now contend should have been done. Litigants cannot be required to second-guess the representations made by the Florida courts. Thus, the order of April 27, 1988 must be deemed the last jurisdictional act in Florida.

CONCLUSION

For all of the foregoing reasons, this Court should note probable jurisdiction.

Respectfully submitted,

Peter W. Herzog, Jr.
Counsel of Record
555 Washington Avenue
Sixth Floor
St. Louis, Missouri 63101
(314) 231-6700

Kathryn A. Klein
Caruthers, Herzog, Crebs & McGhee
555 Washington Avenue
Sixth Floor
St. Louis, Missouri 63101
(314) 231-6700

Counsel for Appellants